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Nos. 04-1034, 04-1384

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In The
Supreme Court of the United States

JOHN A. RAPANOS, ET AL.,

Petitioners,

v.

UNITED STATES,

Respondent.

JUNE CARABELL, ET AL.,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE HONORABLE JOHN D. DINGELL, THE HONORABLE JOHN CONYERS, JR., THE HONORABLE ROBERT F. DRINAN, THE HONORABLE GARY W. HART, THE HONORABLE KENNETH W. HECHLER, THE HONORABLE CHARLES McCURDY MATHIAS, JR., THE HONORABLE PAUL N. McCLOSKEY, JR., THE HONORABLE CHARLES B. RANGEL, AND THE HONORABLE SENATOR RICHARD SCHULTZ SCHWEIKER, AS AMICI CURIAE IN SUPPORT OF THE RESPONDENT

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QUESTIONS PRESENTED

No. 04-1034
Rapanos v. United States

1. Does the Clean Water Act prohibition on unpermitted discharges to "navigable waters" extend to nonnavigable wetlands that do not even abut a navigable water?

2. Does extension of Clean Water Act jurisdiction to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote the connection, exceed Congress' constitutional power to regulate commerce among the states?

No. 04-1384
Carabell v. United States Army Corps of Engineers

1. Does the Clean Water Act extend to wetlands that are hydrologically isolated from any of the "waters of the United States"?

2. Do the limits on Congress' authority to regulate interstate commerce preclude an interpretation of the Clean Water Act that would extend federal authority to wetlands that are hydrologically isolated from any of the "waters of the United States"?

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INTEREST OF AMICI CURIAE[1]

Amici are current and former members of the United States Congress, both Republicans and Democrats, all but one of whom were members of the 92nd Congress, which in 1972 initially adopted the pivotal definitions of the Clean Water Act at issue in this case. In addition, the amici include former Senators who were members of the 95th Congress and who voted in 1977 to reaffirm the broad scope of waters protected by the Clean Water Act. All of the amici supported the Clean Water Act and many played critical roles in the development and enactment of the 1972 legislation and the 1977 amendments.

Amici include the following: The Honorable John D. Dingell of Michigan, the "Dean of the House," was elected as a Democrat to the U.S. House of Representatives by special election to the Eighty-fourth Congress and has served from December 13, 1955 to the present; the Honorable John Conyers, Jr. of Michigan was elected as a Democrat to the U.S. House of Representatives to the Eighty-ninth Congress and has served from January 3, 1965 to the present; the Honorable Robert F. Drinan was elected as a Democrat from Massachusetts to the U.S. House of Representatives to the Ninety-second Congress and served from January 3, 1971 to January 3, 1981; the Honorable Gary W. Hart was elected as a Democrat from Colorado to the U.S. Senate in 1974 and served from January 3, 1975 to January 3, 1987; the Honorable Kenneth W. Hechler of West Virginia was elected as a Democrat to the U.S. House of Representatives to the Eighty-sixth Congress and served from January 3, 1959 to January 3, 1977; the Honorable Charles McCurdy Mathias, Jr.

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[1] Under Rule 37.6 of this Court, the parties have consented to the filing of this brief by the Members and former Members of Congress. This brief was not written in whole or in part by counsel for a party, and no one other than amici and counsel made a monetary contribution to its preparation and submission.

of Maryland was elected as a Republican to the U.S. House of Representatives to the Eighty-seventh Congress and served from January 3, 1961 to January 3, 1969, and was elected to the U.S. Senate in 1968 where he served from January 3, 1969 to January 3, 1987; the Honorable Paul N. (Pete) McCloskey, Jr. was elected to the U.S. House of Representatives as a Republican from California by special election to the Ninetieth Congress and served from December 12, 1967 to January 3, 1983; the Honorable Charles B. Rangel of New York was elected as a Democrat to the U.S. House of Representatives to the Ninety-second Congress and has served from January 3, 1971 to the present; and the Honorable Senator Richard Schultz Schweiker of Pennsylvania was elected as a Republican to the U.S. House of Representatives to the Eighty-seventh Congress and served from January 3, 1961 to January 3, 1969, and was elected to the U.S. Senate in 1968 where he served from January 3, 1969 to January 3, 1981.[3]

STATEMENT OF FACTS

Both of these cases involve wetlands that either the U.S. Environmental Protection Agency (EPA) or the U.S. Army Corps of Engineers (Corps) concluded – and the lower courts directly reviewing these cases affirmed – are "[w]etlands adjacent to," 33 C.F.R. § 328.3(a)(7), "tributaries," *id.* § 328.3(a)(5), to "waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce," *id.* § 328.3(a)(1). Accordingly, consistent with Congress' intent, these wetlands are considered "waters of the United States" and thus fall within EPA's and the Corps' authority under the Clean Water Act. See 33 U.S.C. § 1362(7) (defining "navigable waters" as "waters of the United States, including the territorial seas").

[3] For more complete biographies of these distinguished current and former Members of Congress, go to http://bioguide.congress.gov.

With respect to the three different sites at issue in *Rapanos*, the wetlands were all found to be "adjacent" to tributaries to traditionally navigable waters. The Corps also specifically determined, and the lower courts affirmed as findings of fact, that all three sites have a "hydrological connection to navigable waters." *United States v. Rapanos*, 376 F.3d 629, 635 (6th Cir. 2004). The first site, known as "the Salzburg wetlands," "ha[s] a surface water connection to tributaries of the Kawkawlin River which, in turn, flow into the Saginaw River and ultimately into Lake Huron." *Id.* The second wetlands site, "the Hines Road site[,] ha[s] a surface connection to the Rose Drain which, in turn, has a surface connection to the Tittabawassee River." *Id.* at 642-43. Finally, the third site, "the wetlands at the Pine River . . . have a surface water connection to the Pine River, which flows into Lake Huron." *Id.* at 643.

Similarly, the wetlands at issue in *Carabell* are located next to an unnamed ditch that is connected at one end to the Sutherland-Oemig Drain, which empties into Auvase Creek, which then empties into Lake St. Clair, which connects to Lake Huron and Lake Erie. *Carabell v. United States Army Corps of Engineers*, 391 F.3d 704, 708 (6th Cir. 2004). The other end of the ditch flows into other ditches that also outlet into Auvase Creek and eventually into the Great Lakes drainage system. *Id.* at 705-06. Although berms, which were created when wetland material was excavated to create the unnamed ditch, separate the wetlands from the ditch, the wetlands fall under the regulatory definition of "adjacent wetlands" because that term includes "wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like." 33 C.F.R. § 328.3(c). Despite the clear application of the regulation to their wetlands, the *Carabell* petitioners claim the Corps has no authority to regulate their wetlands because there is no hydrological connection between the wetlands and the ditch as a result of the berms. The Corps maintains that there is an occasional surface water connection when water overtops the berms. *See* BIO at 5, 9. Moreover, the

Corps concluded that the *Carabell* wetlands provide a valuable water storage function, and that filling the wetlands would likely result in "an increased risk of erosion and degradation of water quality" in the traditionally navigable waters of the Great Lakes. 391 F.3d at 706. There is, in other words, a connection between the wetlands and the traditionally navigable waterway because the wetlands slow the flow of the surface water by first retaining it and then allowing it to slowly percolate as ground water. This, in turn, reduces scouring and erosion, which would increase pollution in traditionally navigable waters connected to these wetlands. See generally U.S. EPA, *Functions and Values of Wetlands* 1 (2001), http://www.epa.gov/owow/wetlands/pdf/fun_val.pdf ("Wetlands function like natural tubs or sponges, storing water and slowly releasing it. This process slows the water's momentum and erosive potential, reduces flood heights, and allows for ground water recharge, which contributes to base flow to surface water systems during dry periods.").

SUMMARY OF ARGUMENT

Because wetlands adjacent to traditionally navigable waters, or adjacent to tributaries to those waters, have significant impacts on traditionally navigable waters, Congress intended for them to be subject to regulation under the Clean Water Act. When Congress adopted the Federal Water Pollution Control Act amendments in 1972, it redefined the term "navigable waters" to mean "waters of the United States" for the primary purpose of improving water quality in the Nation. This definition of waters applies broadly to the Act's water pollution control programs, including those aimed at eliminating pollution from industrial waste and raw sewage, preventing oil spills, and regulating the discharge of dredge and fill material.

Thus the EPA's and the Corps' inclusion of tributaries and "adjacent wetlands" in their regulatory definitions of "waters of the United States" and exercise of authority

over those waters is consistent with both the statute and Congress' intent. Moreover, the connection between traditionally navigable waters and these waters leaves no doubt that these cases fail to "raise the sort of grave and doubtful constitutional questions," *Rust v. Sullivan*, 500 U.S. 173, 191 (1991), that might require the Court to second-guess the Corps' almost thirty-year-old regulation. Indeed, this Court upheld the regulation of such waters over twenty years ago in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), a case that is quite similar to these. Because Congress intended for the Clean Water Act to reach the wetlands at issue here and there is no significant constitutional question raised by EPA and the Corps exercising authority over them, the Court should affirm the judgment of the Court of Appeals for the Sixth Circuit in both cases.

ARGUMENT

I. Congress Plainly Intended to Include All Tributaries and Adjacent Wetlands in the Term "Waters of the United States" and Thereby Subject Them to Regulation Under the Clean Water Act

The Clean Water Act[3] (CWA) defines "navigable waters" as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The question before this Court is whether the "adjacent wetlands" at issue in these cases are properly considered "waters of the United States" and thus subject to regulation under the Clean Water Act.

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[3] The Federal Water Pollution Control Act is commonly referred to as the Clean Water Act following the 1977 amendments to the FWPCA. Pub. L. No. 95-217, 91 Stat. 1566 (1977) ("SEC. 518. This Act may be cited as the 'Federal Water Pollution Control Act' commonly referred to as the Clean Water Act.").

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), this Court held that when interpreting a statute that an agency is charged with administering, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Where one can discern Congress' intent by "employing traditional tools of statutory construction," *id.* at 843 n.9, that intent must be given effect. In this case, the intent of Congress is clear: all tributaries and adjacent wetlands like those at issue in these cases fall under the CWA.

A. Congress Intended to Include Tributaries and Adjacent Wetlands in the Term "Waters of the United States."

In passing the CWA, Congress intended to embrace the broadest possible definition of "navigable waters" when it defined that term as "waters of the United States." In particular, Congress intended that term to embrace both tributaries as well as wetlands that are adjacent to traditionally navigable waterways and wetlands that are adjacent to any tributaries connected to those waterways.

i. Congress Intended Comprehensive Protections Through the 1972 Act

The 1972 adoption of the Federal Water Pollution Control Act (FWPCA) reflected Congressional commitment to comprehensively control water pollution, including protection of tributaries and wetlands. Congress intended in 1972 to replace the original FWPCA, passed in 1948. Federal Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155 (1948). That original act was limited to providing technical assistance to states, partially financing municipal sewage treatment works, and providing authority to bring public nuisance lawsuits to abate interstate water pollution when all other means failed.

S. Rep. No. 92-414, at 95 (1971). The 1948 Act left states on their own to establish treatment requirements for pollution sources and to enforce them. Despite this law, by the 1960s the deterioration of the nation's waters was alarmingly evident, and waters in many cities across the country were reduced to sewage receptacles for industrial and municipal waste. *See* Robert W. Adler, Jessica C. Landman and Diane M. Cameron, *The Clean Water Act 20 Years Later* 5-7 (1993).

During the decades leading up to the 1972 Act, the importance of wetlands to overall aquatic ecosystem functioning was steadily becoming apparent in the scientific community. The 1956 Fish and Wildlife Service's publication of Samuel P. Shaw and C. Gordon Fredine's *Wetlands of the United States*[4] provided a new vocabulary – using the generic term "wetlands" in place of terms such as "swamp" or "bog" – that "conveyed positive symbolic value born from trustworthy scientific expertise." Ann Vileisis, *Discovering the Unknown Landscape: A History of America's Wetlands* 209 (1997). Known as Circular 39, the 1956 report articulated a taxonomy of wetland types and clearly explained the value of wetlands as habitat for fish and wildlife. The authors urgently concluded that "[n]ever before in the Nation's history has it been so necessary to plan for the setting aside of land and water areas to serve the future needs of fish and wildlife." Shaw & Fredine, *supra*, at 9. As was true for other water quality matters, leaving wetlands and tributary protection in the control of individual states was not working. Public outcry demanded a strong response. See, e.g., John and Mildred Teal, *Life and Death of the Salt Marsh* 262 (1969) ("This resource is much more extensive – the ribbon of green marshes along the eastern coast of North America, which

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[4] Samuel P. Shaw & C. Gordon Fredine, *Wetlands of the United States: Their Extent and Their Value to Waterfowl and Other Wildlife*, Fish and Wildlife Service Circular 39 (1956), available at http://www.npwrc.usgs.gov/resource/1998/uswetlan/uswetlan.htm.

must be preserved almost in its entirety if its preservation is to have any real meaning."); Kim Diana Connolly, Stephen M. Johnson and Douglas R. Williams, *Wetlands Law and Policy: Understanding Section 404* 2-7 (2006).

ii. The Act's Goals and Purposes and Other Provisions Indicate Congressional Intent to Assert Broad Federal Authority Over Concerns Other Than Navigation

In passing the 1972 FWPCA, Congress articulated one of the broadest ecosystem restoration and protection aspirations in all of environmental law: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251.[5] Courts routinely refer to this objective as the "guiding star" of the statute, see *American Petroleum Institute v. EPA*, 540 F.2d 1023, 1028 (10th Cir. 1976); *Kennecott Copper Corp. v. EPA*, 612 F.2d 1232, 1236 (10th Cir. 1979), or otherwise invoke the language as the main starting point for any analysis, see, e.g., *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 703 (1994); *Arkansas v. Oklahoma*, 503 U.S. 91, 101, 105-06 (1992); *United States v. Riverside Bayview Homes*, 474 U.S. at 132.

Congress' 1972 objective was far removed from the limited goal of protecting navigation as in earlier laws like the Rivers and Harbors Act of 1899, 33 U.S.C. § 401 *et seq.* (2000), which prohibited the discharge of refuse into navigable waters "whereby navigation shall or may be impeded or obstructed." 33 U.S.C. § 407. In addition, it broadened the law's focus far beyond pollution in interstate waters as in the earlier iterations of the FWPCA.

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[5] This statutory objective is reinforced in the statutory definition of "pollution" as the "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(19).

Both the House and Senate reports evinced their intent to restore aquatic ecosystems as closely as possible to their natural state, which clearly extends beyond the earlier traditional intent to provide only for navigation.[6]

"To achieve this objective," 33 U.S.C. § 1251(a), Congress listed seven goals, each of which indicates concern for values other than navigability. *Id.* § 1251(a)(1)-(6). The goals of the law, including "protection and propagation of fish, shellfish, and wildlife," "recreation in and on the water," elimination of "the discharge of toxic pollutants in toxic amounts," and "programs for the control of nonpoint source pollution," are broad. *Id.* § 1251(a).

Perhaps most notably, Congress required the states or EPA to adopt water quality standards for all waters covered by the Act "taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, *and also taking into consideration their use and value for navigation.*" *Id.* § 1313(c) (emphasis added). The fact that navigation was but one of many values for which the waters of the United States were provided statutory protection belies a narrow focus on only traditionally navigable waters.

Members of Congress repeatedly emphasized the sweeping purposes of the 1972 amendments. For example, in the debates leading to Congress' override of President Nixon's veto of the legislation, which the President viewed as unconscionably expensive, Representative John D. Dingell of Michigan said: "The protection of our *natural resources*, particularly our waterways which serve our *health and wildlife needs and the recreational needs of*

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[6] S. Rep. No. 92-414, at 12 (1972), *reprinted in* 1972 U.S.C.C.A.N. at 3742; H.R. Rep. No. 92-911, at 76-77 (1972), both quoted *infra*; *see also* Robert W. Adler, *The Two Lost Books in the Water Quality Trilogy: The Elusive Objectives of Physical and Biological Integrity*, 33 ENVTL. L. 29, 44-46 (2003).

urban and rural areas cannot in any sense whatsoever be described as unconscionable." 118 Cong. Rec. 37,058 (Oct. 18, 1972) (emphasis added). In short, Congress sought to protect water quality for a wide range of natural resource values, and not merely to preserve navigability of large waterways.

iii. The Legislative History of the Term "Navigable Waters" Indicates Congressional Intent to Broadly Cover Waters of the United States, Not Just Traditionally Navigable Waters

Both the House and Senate versions of the bills to amend the FWPCA were written to expand federal authority to control and ultimately eliminate discharges of all types of water pollution across the country. H.R. 11,896, 92nd Cong. (1971); S. 2770 92nd Cong. (1971). They both sought to restructure the nation's federal authority to control water pollution while drawing upon much of the structure and language of earlier statutes. Thus, in their original bills, both bodies borrowed the term "navigable waters" from existing laws, and originally included a definition that itself used the term "navigable."[7] However, in the reports discussing their respective versions of the legislation, members of both chambers expressed concern about potentially narrow interpretations of what waters they intended the Act to cover.

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[7] In the Senate, the definition read "the term navigable waters means the navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes. S. 2770, 92nd Cong. 502(h) (1971). The House bill's definition read "[t]he term 'navigable waters' means the navigable waters of the United States, including the territorial seas." H.R. 11,896, 92nd Cong. 502(8) (1971).

The House Public Works Committee stated:

> The Committee is reluctant to define the term 'navigable waters.' This is based on the fear that any interpretation would be read narrowly. This is not the Committee's intent. The Committee fully intends the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."

H.R. Rep. No. 92-911, at 76-77 (1972). The Senate Committee on Public Works likewise stated:

> The control strategy of the Act extends to navigable waters. The definition of this term means the navigable waters of the United States, portions thereof, tributaries thereof, and includes the territorial seas and the Great Lakes. Through a narrow interpretation of the definition of interstate waters the implementation [of the] 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharges of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries.

S. Rep No. 92-414, at 77 (1971).

Although the House report focused on the need for a broad constitutional interpretation of the Act's scope while the Senate report spoke to the scientific reality of waters being interconnected, both bodies signaled their desire not to constrain the reach of the Act to those waters previously protected solely on the grounds of traditional navigability. In other words, Congress adopted a new view as to the nature of pollution and how to control it at a federal level.

When the House and Senate met in Conference Committee to finalize the 1972 Act, they took an additional step to ensure that the definition of "navigable waters" did not result in unduly narrow interpretations.

As discussed in the report of the Conference Committee, the House version of the definition was accepted into the final bill, but the word "navigable" was deleted from the definition. Thus, the new definition read as follows: "The term 'navigable waters' means waters of the United States, including the territorial seas." S. Rep. No. 92-1236, at 144 (1971). The Conference report adopted the precise terminology of the earlier House Public Works Committee report to confirm that the term "must be given the broadest constitutional interpretation," and proclaimed that the interpretation of this definition must be "unencumbered by agency determinations which have been made or may be made for administrative purposes." *Id.*

Finally, the debate in Congress on final passage of the Act confirmed the conference report's intent that the law be given broad application. Representative Dingell, who reported the conference committee bill to the House, explained the definition in his statement:

> [The] conference bill defines the term "navigable waters" broadly for water quality purposes. It means all "the waters of the United States" in a geographical sense. It does not mean "navigable waters of the United States" in the technical sense as we sometimes see in some laws. The new and broader definition is in line with more recent judicial opinions which have substantially expanded that limited view of navigability – derived from the Daniel Ball case (77 U.S. 557, 563) – to include waterways which would be "susceptible of being used * * * with reasonable improvement," as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris, et cetera [citing cases]. . . .
>
> [T]his new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as

> determined by the Corps of Engineers, going to govern matters covered by this bill. Indeed, the conference report states on page 144: "The conferees fully intend that the term navigable waters be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."

118 Cong. Rec. 33,756-57 (Oct. 4, 1972).

Particular attention should be paid to Representative Dingell's pivotal opening sentence of the passage, which set the context for the rest of the explanation. He said that "the conference bill defines the term 'navigable waters' broadly for *water quality* purposes." *Id.* (emphasis added). This opening sentence indicates that the new definition should be interpreted "broadly," but more important is the related reasoning. Representative Dingell signaled that the purpose of the bill's expanded jurisdictional definition was to protect water quality as an independent value, and not merely "navigation" or "navigability" as one of the many possible impacts of water pollution on interstate commerce.

The manner in which both the Senate and House committees defined this overriding objective belies any possibility that Congress intended to focus narrowly on navigable waters, as opposed to *all* "waters of the United States" that might affect the ecosystem integrity objective of the law. The 1972 Senate Report, for example, confirms the intent to restore entire aquatic ecosystems to as close as possible to their natural state:

> Maintenance of such integrity requires that any changes in the environment resulting in a physical, chemical or biological change in a pristine water body be of a temporary nature, such that by natural processes, within a few hours, days or weeks, the aquatic ecosystem will return to a state functionally identical to the original. . . .

> In those water bodies which are not pristine, it should be the national policy to take those steps which will result in change towards that pristine state in which the physical, chemical and biological integrity of the water body can be said to exist . . . an objective which minimizes the burden to man in maintaining a healthy environment, and which will provide for *a stable biosphere that is essential to the well-being of human society.*

S. Rep. No. 92-414, at 76 (1972) (emphasis added); see also H.R. Rep. No. 92-911, at 76-77 (1972) (discussing the goal of the legislation as preserving natural ecosystem structure and function).

Because aquatic ecosystems are comprised of intricately connected hydrological systems, the legislative history further reflects Congress' understanding that even traditionally navigable waters could be protected only if the aquatic ecosystem as a whole was protected. In explaining the related definition of "discharge of a pollutant," 33 U.S.C. § 1362(12), for example, Representative Dingell noted that discharges covered by the Act need not be directly to a waterway if pollutants degraded downstream waters after transport over land. 118 Cong. Rec. 33,758. The 1971 Senate Report articulated a similar concept: "Water moves in hydrological cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 92-414 (Oct. 28, 1971), at 77. Thus, the legislative history repeatedly clarifies that the Act covers not only traditionally navigable waterways, but smaller streams, all tributaries, and wetlands that form components of and are essential to the "chemical, physical, and biological integrity" of the larger aquatic ecosystem. *E.g.*, 118 Cong. Rec. 33,756-57 (Oct. 4, 1972) (Representative Dingell's statement that the bill applied to "all water bodies, including main streams and their tributaries, for water quality purposes"); 118 Cong. Rec. 40,192 (Representative Dingell's statement regarding the need to preserve wetlands); S. Rep. No. 92-414, *supra*, at 77 (coverage

of "navigable waters, portions thereof, and their tributaries").

In order to accomplish the above-described jurisdictional expansion, Congress deliberately deleted the term "navigable" from its statutory definition of "navigable waters" in the text of the Act. As one scholar has noted, "after 1972, federal courts and legal commentators began to call 'the navigable waters of the United States' the '*traditional* navigable waters of the United States' to clearly distinguish that term from the much more extensive geographic jurisdiction of the FWPCA of 1972." Lance D. Wood, *Don't Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands (A Response to the Virginia Albrecht/Stephen Nickelsburg ELR Article, the Fifth Circuit's Decision In re Needham, and to the Supreme Court's Dicta in SWANCC)*, 34 ENVTL. L. RPTR. 10,187 (2004); see, e.g., *Hanson v. United States*, 710 F. Supp. 1105, 1108 (E.D. Tex. 1989); *Bayou Des Familles Development Corp. v. U.S. Corps of Engineers*, 541 F. Supp. 1025, 1036 (E.D. La. 1982); *American Dredging Co. v. Dutchyshyn*, 480 F. Supp. 957, 960 (E.D. Pa. 1979); *NRDC v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975).

B. To Meet the Law's Broad Pollution Prevention and Water Quality Goals, Congress Adopted One Definition of "Waters of the United States" To Govern All of the Act's Programs

Petitioners' suggestion that wetlands such as theirs fall outside of the term "navigable waters" is not only contrary to the letter and history of the CWA, it would frustrate Congress' goals in enacting this comprehensive law by excluding from CWA jurisdiction vast amounts of ecologically valuable wetlands adjacent to the innumerable tributaries not considered traditionally navigable waters. This omission would adversely affect water quality, flood control, and habitat for the traditionally navigable water

bodies lying downstream. It would also improperly narrow other CWA provisions designed to address the full range of water pollution problems identified by Congress, as these other provisions of the law all rely on the same definition waters in CWA § 502(7). These include CWA § 301, the broad prohibition on discharging into waters without a permit, the CWA § 402 permit program, which covers all polluting discharges other than dredged or fill material, and CWA provisions relating to water quality standards (including CWA § 401), oil pollution prevention and cleanup (CWA § 311), and toxic effluent standards and prohibitions (such as CWA § 307). These regulatory programs administered by EPA all use what is essentially the same definition of "waters of the United States" that the Corps has relied on to implement the § 404 dredge and fill permit program. Opinion of Attorney General Benjamin Civiletti, 43 Op. Att'y Gen. 15.[8]

Tying EPA's and Corps' hands so the agencies cannot effectively protect water quality or eliminate discharges at their source is not what Congress intended in 1972 when it enacted its comprehensive, interstate solution for a perceived national crisis concerning water pollution. Indeed, petitioners' narrow interpretation is directly contrary to Congress' express intent that the term "navigable waters"

[8] "The term 'navigable waters' . . . is a linchpin of the Act . . . , critical not only to the coverage of 404, but also to the coverage of the other pollution control mechanisms established under the Act. . . . Its definition is not specific to 404, but is included among the Act's general provisions. It is, therefore, logical to conclude that Congress intended that there be only a single judgment as to whether – and to what extent – any particular water body comes within the jurisdictional reach of the federal government's pollution control authority. We find no support either in the statute or its legislative history for a conclusion that a water body would have one set of boundaries for purposes of dredged or fill permits under 404 and a different set for purposes of the other pollution control measures in the Act." 43 Op. Att'y Gen. No. 15, at 5 (Sept. 5, 1979).

be given the "broadest possible constitutional interpretation."

C. The Court Should Not Disregard the Agencies' Definition.

Despite the clear intent of Congress to include adjacent wetlands within the definition of "waters of the United States," Petitioners assert that EPA's and Corps' interpretation raises constitutional concerns and therefore the Court should interpret the statute without reference to the agency's regulation. See *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*, 531 U.S. 159, 172-73 (2001) ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." (citation omitted)).

The agency regulations at issue in this case, however, which are faithful to Congress' intent to protect all navigable waters and all of their tributaries, do not even remotely invoke the outer edge of Congress' power. The agencies argued, and the reviewing courts in these cases agreed, that the waters at issue here are all "adjacent" to traditionally navigable waters or tributaries thereto. Therefore, they are governed by 33 C.F.R. § 328.3(a)(7), which applies to "[w]etlands adjacent to" waters such as tributaries, *id.* § 328.3(a)(5), to "waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce," *id.* § 328.3(a)(1).

Notably, this case does not rely on the regulation at issue in *SWANCC*, 33 C.F.R. § 328.3(a)(3), which governs "[a]ll other waters . . . the use, degradation or destruction

of which could affect interstate or foreign commerce . . . ," *i.e.*, waters which are *not* navigable themselves, tributary to navigable waters, or wetlands adjacent to such waters. While *amici* do not agree with the treatment of this regulation in *SWANCC*, that regulation is not before the Court under the facts of these cases, and its scope and constitutionality is not at issue here.

Instead, because there is a direct connection between adjacent wetlands and traditionally navigable waters evident in both situations, these cases fall within the first category of Congress' authority under the Commerce Clause to "regulate the use of the channels of interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558 (1995). This power generally "allows Congress to make laws that protect the flow of commerce." *United States v. Deaton*, 332 F.3d 698, 706 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964) (upholding congressional power to bar racial discrimination in hotels because this discrimination had a "disruptive effect . . . on commercial intercourse") and *United States v. Darby*, 312 U.S. 100, 114-15 (1941) (upholding congressional power to forbid interstate commerce in goods made by child labor because traffic in such goods encourages "competition . . . injurious to the commerce")).

This Court has repeatedly confirmed Congress' power over waters such as those at issue here without limit to waters that are themselves navigable:

> [I]t cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. . . . In truth the authority of the United States is the regulation of commerce on its waters. Navigability. . . . is but part of this whole. Flood protection, watershed development, recovery of the costs of improvements through utilization of power are likewise parts of commerce control. . . . [The] authority is as broad as the needs of commerce.

United States v. Appalachian Electric Power Co., 311 U.S. 377, 426-27 (1940); see also *Kaiser Aetna v. United States*, 444 U.S. 164, 173 (1979) ("Reference to the navigability of a waterway adds little if anything to the breadth of Congress' regulatory power over interstate commerce.") (Rehnquist, J.).

As discussed above, Congress intended that the CWA protect water resources broadly. At a minimum, however, by reducing the input of pollutants into waterways, the Act prevents major blockages or other hazards in or impairments to these waters, such as keeping the Cuyahoga River from catching fire, as it did in 1969, due to "a slick of industrial waste." *SWANCC*, 531 U.S. at 174 (2001) (Stevens, J., dissenting); see also *Kernan v. American Dredging Co.*, 355 U.S. 426, 427 (1958) (detailing the death of a seaman due to the ignition of petroleum pollutants floating on the surface of the Schuylkill River in Philadelphia).

Congress' power to ensure that traditionally navigable waters are free of such hazards cannot mean that it may only restrict discharges of pollutants directly into those waters. Discharges into the tributaries and wetlands adjacent to those tributaries can be just as detrimental. As the Sixth Circuit explained:

> It would, of course, make a mockery of [Congress'] powers if its authority to control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned. The navigable part of the river could become a mere conduit for upstream waste.

United States v. Ashland Oil & Transp. Co., 504 F.2d 1317, 1326 (6th Cir. 1974); *see also Oklahoma ex rel. Phillips v. Atkinson Co.*, 313 U.S. 508, 523 (1941) ("It is clear that Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions."). Accordingly, the regulatory

definition of tributary is broad, as Congress intended, and includes all waterbodies that flow into navigable waters. Cf. *United States v. Gerke*, 412 F.3d 804, 805-06 (7th Cir. 2005) ("A stream can be a tributary; why not a ditch? A ditch can carry as much water as a stream, or more; many streams are tiny. It wouldn't make much sense to interpret the regulation as distinguishing between a stream and its manmade counterpart.").

With respect to adjacent wetlands in particular, the Corps explained in 1977 that if adjacent wetlands are polluted or otherwise filled so that they are unable to function, that directly impacts the water quality in the entire aquatic system:

> The regulation of activities that cause water pollution cannot rely on . . . artificial lines [such as the mean tide line and the ordinary high water mark] . . . but must focus on all waters that together form the entire aquatic system. Water moves in hydrological cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark or mean high tide line, will affect the water quality of the other waters within the aquatic system.

42 Fed. Reg. 37,121, 37,128 (July 19, 1977).

Specifically, water quality in traditionally navigable waters is potentially affected by filling or otherwise polluting adjacent wetlands in three possible ways: (1) pollutants enter a wetland and thus the hydrological system and eventually make their way to traditionally navigable waters, polluting them; (2) a filled or polluted wetland is no longer able to remove pollutants from the water that runs through it as it would normally do, which leads to increased pollution in traditionally navigable waters; and (3) a filled wetland no longer slows and retains water and thus scouring occurs leading to increased erosion and pollution in the traditionally navigable waterways. See U.S. EPA, *Functions and Values of Wetlands*

1 (2001), at http://www.epa.gov/owow/wetlands/pdf/fun_val.pdf (describing the primary functions of wetlands as water storage and water filtration); *United States v. Riverside Bayview Homes*, No. 84-701, Brief for the United States at 3 ("many wetlands purify water by holding nutrients and recycling pollutants"); *id.* at 39 n.29 (providing an extensive explanation of pollutant removal potential of wetlands).

As the record makes clear, the three wetlands at issue in the *Rapanos* case have a demonstrated hydrological connection to the navigable waters and could have any of the three impacts on those waters discussed above were they polluted or filled. Accordingly, they clearly fall within Congress' authority under the Commerce Clause.

With respect to the wetlands at issue in *Carabell*, even if one assumes that there is no surface water connection between the wetlands and the ditch they directly abut, that case too raises no significant constitutional questions. The *Carabell* case is, at a minimum, an example of the third category of water quality impacts resulting from filling or otherwise polluting wetlands. The connection identified by the Corps was that if the *Carabell* wetlands were filled, there would be a significant reduction in the retention of the surface water. This in turn would mean increased scouring and erosion and thus eventually increased pollution in the Great Lakes system. Congress' power under the Commerce Clause surely allows it to prevent significant harms of this sort to traditionally navigable waters.

In sum, the regulations at issue do not raise a "close" constitutional question because they cover only wetlands that are connected to traditionally navigable waters. This Court should therefore follow its usual practice under *Chevron* and conclude that, as Congress intended, the statute unambiguously embraces adjacent wetlands within the definition of "waters of the United States."

In the alternative, if the Court finds that the intent of Congress is not clear, it should afford deference to the Corps' inclusion of adjacent wetlands because it is a

reasonable interpretation of the statute, as it did in *Riverside Bayview Homes*. See 474 U.S. at 131-34. Deference to an agency's determination is particularly appropriate when the agency, such as EPA and the Corps here, administers a complex, technical statute. See, e.g., *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991). These regulations are particularly reasonable in that they do not define the term "waters of the United States" to include each and every possible waterbody of the United States but rather, consistent with the extensive legislative history discussed above, only those waters with an impact on traditionally navigable waters.

Moreover, the inclusion of adjacent wetlands that are separated by barriers from traditionally navigable waters or tributaries to those waters is reasonable in that those wetlands are likely to have at least a groundwater connection to the adjacent waterbody. See National Research Council, *Wetlands, Characteristics and Boundaries* 156 (1995) ("Even water quality functions might not be separate for isolated and other wetlands because of the ground water connections between isolated wetlands and surface waters."); R.W. Tiner, H.C. Bergquist, G.P. DeAlessio and M.J. Starr, *Geographically Isolated Wetlands: A Preliminary Assessment of Their Characteristics and Status in Selected Areas of the United States* § 2 (2002), at http://wetlands.fws.gov/Pubs_Reports/isolated/report.htm (even geographically-isolated wetlands can be "connected hydrologically via groundwater connections to other wetlands and to rivers and streams."). In addition, including adjacent wetlands separated by human-made barriers prevents individuals and entities who have constructed or who are tempted to construct barriers or the like between their wetlands and a traditionally navigable water (or a tributary thereto) from evading the Act's requirements. Cf. *Motor Vehicle Manufacturer's Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42 (1983) ("[A] reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors and within the

scope of the authority delegated to the agency by the statute.").

II. Under the Facts of Both Cases, Affirmance is Warranted Under *United States v. Riverside Bayview Homes*.

A. Both Cases Are on All Fours With *Riverside Bayview*.

In *Riverside Bayview*, this Court upheld the authority of EPA and the Corps to exercise regulatory jurisdiction under the federal CWA over wetlands, like those at issue here, that are "adjacent to" navigable bodies of water, but that are "not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as 'waters.'" 474 U.S. at 131. The Court also held as a matter of regulatory interpretation that adjacent wetlands do not have to be flooded by surface waters to be included in the regulatory definition of wetlands. *Id.* at 129-31. Although these areas were not connected to traditionally navigable waters via surface hydrology, the District Court found that the soils supported wetland "vegetation that requires saturated soils for growth and reproduction," that the soils were saturated due to ground water, and that "the wetland was adjacent to a body of navigable water, since the area characterized by saturated soil conditions and wetland vegetation extended beyond the boundary of [the] property to Black Creek, a navigable waterway." *Id.* at 130-31. Notably, the District Court did not expressly find a hydrological connection between the waters of either Black Creek or Lake St. Clair and the ground water responsible for soil saturation on the property in question.

The Court in *Riverside Bayview* declined to address, as unnecessary to its decision in the case, whether the Act covers "isolated" as well as adjacent wetlands. *Id.* at 131 n.8. That distinction set the stage for the decision in *SWANCC*, which answered the question in the negative as

regards intrastate, isolated ponds connected only by migratory bird use. In *SWANCC*, however, this Court did not disturb the fundamental holding in *Riverside Bayview* that any waters that are adjacent to navigable waters remain subject to CWA jurisdiction. *See SWANCC*, 531 U.S. at 167 (reiterating holding of *Riverside Bayview* as "the Corps had § 404(a) jurisdiction over wetlands that actually abutted on a navigable waterway").

The wetlands at issue in both *Rapanos* and *Carabell* are not like the "isolated" ponds in *SWANCC* but rather are almost identical to the wetlands at issue in *Riverside Bayview*. They all directly abut a tributary that feeds into navigable waters and as such, have direct and tremendous impacts on those waters. Because this Court upheld the regulations in circumstances very similar to these, there is no reason to change course.

B. The History of the 1977 Amendments Relied on in *Riverside Bayview* Further Supports Affirmance.

When drawing a parallel to *Riverside Bayview* in these cases, it is important that the Court acknowledge, as it did in *Riverside Bayview*, Congress' actions and statements indicating that it clearly intended the phrase "navigable waters" to include wetlands, without regard to artificial geographic limitations, when passing the 1977 amendments. See *Riverside Bayview*, 474 U.S. at 137 ("Although we are chary of attributing significance to Congress' failure to act a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it."); cf. *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 626 (8th Cir. 1979) (relying on 1977 legislative history to determine regulatory scope of Section 404 as originally passed).

In 1977, the regulatory battle over the jurisdiction of the Act[9] was reflected by two competing approaches to amending the 404 program considered by Congress. As it had in 1972, the broader approach won out.

The first approach was that taken in the bill reported out of the Senate Environment and Public Works Committee, which sought to address various concerns regarding the implementation of the 404 program, especially workload issues. Most importantly the Committee made clear that "[t]he committee amendment is designed to reaffirm this intent and dispel the widespread fears that the program is regulating activities that were not intended to be regulated." S. Rep. No. 95-370, 95th Cong., 1st Sess. (1977), at 74-75.

In response, during the Senate's floor debate on the 1977 amendments, Senator Lloyd Bentsen of Texas offered an amendment to the Environment and Public Works Committee's bill that would have amended the Act to limit the scope of § 404 to only traditionally navigable waters and their adjacent wetlands. The Congressional Record contains a long debate held before the full Senate voted on the Bentsen plan to narrow the scope of the CWA protections for wetlands and other waters from discharges of dredge and fill material. It is clear from the debate that all agreed that the scope of the Act since 1972 had reached all waters of the United States, and that bill as proposed would not reduce that scope of protection.

As Senator Bentsen himself stated: "The committee has failed to recommend any reduction in the scope of the § 404 permit program. . . . The program would still cover all waters of the United States, including small streams, ponds, isolated marshes, and intermittently flowing gullies." 123 Cong. Rec. 26,711 (Aug. 4, 1977). In supporting this

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[9] See generally Sam Kalen, *Commerce to Conservation: The Call for a National Water Policy and the Evolution of Federal Jurisdiction Over Wetlands*, 69 N. D. L. REV. 873, 886-905 (1993).

amendment, Senator John Tower of Texas referred to *NRDC v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975) – in which NRDC argued and the district court agreed that the Corps' cramped reading of "navigable waters" was a failure to implement the full statutory mandate of the CWA – when he stated: "A court decision, coupled with an administrative decision, is causing us to be faced with a regulatory scheme which covers not just the rivers of the Nation but all surface waters and wetlands of the United States." 123 Cong. Rec. 26,721-22 (Aug. 4, 1977).

Opponents of Senator Bentsen's amendment readily acknowledged that the Environment and Public Works Committee's bill maintained the broad jurisdiction enacted in 1972, and argued why Senator Bentsen's amendment to reduce jurisdiction of the Act should be rejected. In particular, Senator Gary Hart of Colorado spoke at length on the shortcomings of the approach advocated by Senator Bentsen:

> The Congress can capitulate. The Congress can abandon the national interest. The Congress can permit activities of a dredge-and-fill nature to go forward on those small streams, marshes, wetlands, and swamps which will make their way into the bigger waterways of this country and have a tremendous adverse effect on the people of this country and on their welfare, on their crops, on many of their activities. Or we can establish a program of the sort the committee has established, which will protect all of those water systems; which will protect all of the elements of those systems, which will not permit dredge and fill activities to deposit very toxic materials into those waterways.

123 Cong. Rec. 26,713 (Aug. 4, 1977). Likewise, Senator John H. Chafee of Rhode Island spoke passionately about the value of wetlands for the whole country and why Senator Bentsen's proposal for eliminating broad federal protection for intrastate waters should be rejected:

> I think it is important to bear in mind that marshes and wetlands are not a parochial responsibility or an asset; they are not a local asset; they are a national asset. They are not just confined within boundaries which happen to exist for any one of our States. The wetlands perform a vital part of the food chain for our wildlife. . . . I should like to stress that these wetlands are not something that belong to Louisiana or Rhode Island or Michigan or Minnesota. They belong to all the citizens. They are much too valuable to be abandoned to some unstable, fragmentary kind of protection. We must bear in mind that these wetlands are part of this larger system. They are not independent. They do not belong only to Minnesota, so that if Minnesota wants to fill them in, it is too bad for the Nation. We have to remember that it affects everything else downstream. There is a linkage between wetlands and streams and estuaries and rivers, and they all must live in harmony, through wise management.

123 Cong. Rec. 26,716-17 (Aug. 4, 1977). Finally, Senator Howard Baker of Tennessee argued that both the Environment and Public Works Committee and courts recognized and were effectuating the common scientific understanding of hydrological linkage between all types of waters:

> Unless Federal jurisdiction is uniformly implemented for all waters, dischargers located on nonnavigable tributaries upstream from the larger rivers and estuaries would not be required to comply with the same procedural and substantive standards imposed upon their downstream competitors. Thus, artificially limiting the jurisdiction can create a considerable competitive disadvantage for certain discharges. . . . It is important to understand that toxic substances threaten the aquatic environment when discharged into small

> streams or into major waterways. Similarly, pollutants are available to degrade water and attendant biota when discharged in marshes and swamps, both below and above the mean and ordinary high water marks. . . . Continuation of the comprehensive coverage of this program is essential for the protection for the aquatic environment. The once seemingly separable types of aquatic systems are, we now know, interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the entire resource.

123 Cong. Rec. 26,718 (Aug. 4, 1977) (emphasis added). Senator Bentsen's amendment was ultimately defeated by a vote of the full Senate.

The fact that a later Congress debated the value of wetlands when determining the scope of its jurisdiction with respect to an earlier enactment should be afforded "persuasive value" because "[h]ere we have Congress at its most authoritative, adding complex and sophisticated amendments to an already complex and sophisticated act. Congress is not merely expressing an opinion . . . but is acting on what it understands its own prior acts to mean." *Bell v. New Jersey*, 461 U.S. 773, 784-785 & n.12 (1983) (quoting *Mount Sinai Hosp. v. Weinberger*, 517 F.2d 329, 343 (5th Cir. 1975)). Various Members' remarks praising the valuable biological and hydrologic contributions of wetlands, particularly when made during debate over geographic jurisdiction, thus cannot be squared with artificial geographic limits suggested by Petitioners.

In addition to the clear statements of Congress describing the broad jurisdiction of the Act, Representative Don H. Clausen of California referred in his comments to a Library of Congress publication entitled "Case Law Under the Federal Water Pollution Control Act Amendments of

1972." 123 Cong. Rec. 38,976 (Dec. 15, 1977). This document discusses *NRDC v. Callaway* and other cases reaching similar conclusions on the scope of Section 404. As this Court has recognized when considering a different section of the CWA, Representative Clausen's statement and the Library of Congress litigation summary to which he referred demonstrate Congressional awareness that it was rejecting an effort to legislatively overrule that case law interpreting Congressional intent reflecting a very broad jurisdiction of the CWA. See *Chemical Manufacturers Ass'n v. NRDC*, 470 U.S. 116, 128 & n.17 (1985).

Finally, Congressional support for broad geographic jurisdiction is reflected in one of the amendments to Section 404 that Congress did pass in 1977. The addition of subsection (g) to Section 404 thoroughly repudiates any limitation of the Section to traditionally navigable waters as the Petitioners would assert. Section 404(g) provides for state assumption of the Section 404 program under certain conditions. However, Section 404(g)(1) expressly excludes state assumption of jurisdiction over traditionally navigable and tidal waters, "including wetlands adjacent thereto." 33 U.S.C. § 1344(g)(1). Had Congress intended to limit Section 404 to traditionally navigable waters in the first place, this later addition of an option for state assumption of regulation over all other areas would be meaningless because there would be nothing to assume. Section 404's geographic scope therefore must be construed to avoid rendering Section 404(g) meaningless or superfluous.

CONCLUSION

The judgment of the Court of Appeals in both cases should be affirmed.

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